IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.561 OF 1993

1. Shri.Kishor Tulsidas Choksi
(also known as Kishorchandra
Tulsidas Choksi)
Flat No.11, 4th Floor,
Pavlova Co-operative Housing
Society Ltd., L.D.Ruparel Road,
Bombay - 400 006.

2. Shri.Vithal Tulsidas Choksi
as father and natural guardian
of Master Rohan Vithaldas Choksi,
108 'B' 10th Floor, Shantinagar,
L.Jagmohandas Road,
Bombay - 400 006.

3. Shri.Mahendra Natvarlal Mehta,
18, Park View, IL Monte Co-op.
Housing Society Limited, Little
Gibbs Road, Bombay - 400 006.

4. Smt.Kokila Mahendra Mehta,
18, Park View, IL Monte Co-op.
Housing Society Limited, Little
Gibbs Road, Bombay - 400 006. **..Petitioners**

Versus

1. The Appropriate Authority
Constituted of :
i) S.K.Laul,
Chief Engineer.
ii) S.L.Tiwari
Commissioner of Income - tax.
iii) C.M.Betgiri
Commissioner of Income - tax
All members, Appropriate Authority
appointed by the Central
Government under Chapter XXC of
the Income Tax Act, 1961 having
their office 3rd Floor,
Mittal Court, 'A' Wing,
Nariman Point, Bombay - 400023.

2. Union of India. **..Respondents**

Mr.K.B.Bhujale for the Petitioners.

Mr.R.Ashokan for the Respondents.

CORAM :- DR.S.RADHAKRISHNAN &
V.C.DAGA, JJ.
DATE : 5TH JUNE, 2007

JUDGMENT (PER : DR.S.RADHAKRISHNAN,J.)

1. By this Petition, the Petitioners are challenging the order dated 18th February,1993, passed by the Commissioner of Income Tax under Section 269UD(1) of the Income Tax,1961 (hereinafter referred to as "the Act"). The Petitioners have also prayed for a direction to the Respondent No.1 for grant of 'No Objection Certificate' under Section 269UL (3) of the Income Tax Act. The Petitioners have further prayed that the Central Government be directed to make good the loss caused to the Petitioners and to pay the amount with interest. The Petitioners have also prayed for an injunction restraining the Respondents from proceeding further by way of taking possession of the property, in pursuance of the impugned order.

2. The brief facts of the case are that the Petitioner No.4 is wife of Petitioner No.3, Petitioner No.1 is true brother of Petitioner No.4 and Petitioner No.2 is a minor son of brother of Petitioner No.4. The Petitioner Nos.1 and 2 (hereinafter referred to as the Purchasers) had executed an agreement with Petitioner Nos.3 and 4 (hereinafter referred to as the

Vendors) for a consideration of Rs.14,00,000/-, out of which Rs.5,15,000/- was paid on 27th September,1986. As the transaction was of prior to 1st October,1986, it had required "No Objection Certificate" from Competent Authority under Chapter XX-A of the Income Tax Act,1961, therefore, on 29th September,1986 the Petitioners had filed a declaration in Form No.37EE on 29th September,1986. As an abundant precaution, the Petitioners had also filed a declaration in Form No.37-I. On 12th November,1986, the Petitioners had received a letter from Respondent No.1 calling for details of the said flat, and accordingly, the Petitioners had furnished the same. Thereafter, on 19th December,1986, the order of purchase under Section 269UD91) of the Income Tax Act,1961 came to be passed.

3. Aggrieved thereby, the Petitioners had filed a Writ Petition No.3548 of 1986, wherein this Court had set aside the order passed by the Respondents under section 269UD(1) of the Income Tax Act. On 30th December,1992, Respondent No.1 had issued a show cause notice along with reasons recorded for passing an order dated 19th December,1986.

4. It is the case of the Petitioners that the Valuation Reports dated 20th November,1986 & 8th December, 1986 and note of I.A.C. dated 20th November,1986 & 10th December,1986 and the

material/information regarding the four transactions relied on by the Appropriate Authority were not furnished, though demanded by the Petitioners. On 14th January,1993, the Petitioners had filed their written submission, and on 15th January,1993, the Petitioners had made their oral submissions before the Appropriate Authority and had requested the Appropriate Authority to furnish the material relied on by the said Appropriate Authority including valuation reports and to give fair opportunity for reply in spite of that the Appropriate Authority did not furnish the material and reports. Thereafter on 22nd February,1993, the Petitioners had received an order of the Commissioner of Income Tax under Section 269UD(1) of the Income Tax Act dated 18th February,1993, whereby the purchase of the said property was directed. Aggrieved thereby, the Petitioners have filed the present Petition.

5. The learned Counsel Mr.Bhujale appearing on behalf of the Petitioners contended that the impugned order passed by the Commissioner of Income Tax is patently unjust, illegal and invalid, as the agreement entered into between the parties are close relatives and the said agreement was executed on 14th September,1986 on payment of Rs.5,15,000/- as a part payment before 1st October,1986, and as the transaction entered into between the close relatives, Chapter XXA of the Act is applicable and accordingly,

they had complied with the provisions of Chapter XXA of the Act.

6. It appears that the Petitioner No.1 had purchased the said flat from his sister with the intention to settle in Mumbai after his retirement, close to his sister and daughters.

7. The learned Counsel for the Petitioners, Mr.Bhujale has vehemently submitted that the Appropriate Authority had not proved understatement of consideration or any attempt to evade tax. The learned Counsel for the Petitioners has therefore strongly contended that such presumption of understatement of consideration and attempt to evade tax and in the case of bona fide transaction between close relatives cannot be held to be valid and accordingly, cannot be a valid basis for compulsory purchase of property under Chapter XXC of the Act.

8. It is further case of the Petitioners that the market value of the subject property was not determined and only an observation was being made that the apparent consideration was low. The learned Counsel for the Petitioners has submitted that it was not sufficient to prove understatement or that the difference was more than 15% and there was no valid basis for presumption of attempt to evade tax.

9. It is further submitted by Mr.Bhujale, the learned Counsel for the Petitioners that the comparable transactions in the same building and other comparable transactions proving thereby that there was no understatement of consideration, relied upon by the Petitioners were not considered at all. The learned Counsel for the Petitioners also submitted that in spite of request being made for supply of valuation report, note of Deputy Commissioner of Income Tax i.e. Appropriate Authority and other material information have not been furnished and no fair opportunity of hearing was given. Hence, there is no positive and valid finding regarding attempt to evade tax. The learned Counsel for the Petitioners further contended that the transaction entered into between the close relatives i.e. brother and sister and out of love and affection and it was executed on 14th September,1986 and Rs.2,15,000/- was paid before the date of the agreement and by September,1986 total amount of Rs.5,15,000/- has been paid which itself shows that transaction was complete before 1st October,1986. Therefore, it is contended that Chapter XXA is applicable in the instant case, and accordingly, the Petitioners had complied with the provisions of Chapter XXA of the Act and even the Competent Authority had not acquired the property, on this ground also the impugned order dated 18th February,1993 is illegal and invalid. It is further

contention of the Petitioners that though the transaction was between the close relatives, the exemption has been denied on the ground that the agreement does not indicate that the transaction entered into is an outcome of natural love and affection.

10. It is the contention of the Petitioners that as the transaction entered into between the close relatives and the consideration amount was fixed before execution of the agreement and all the sale transaction had been completed by July,1987 and all payments have been made out of Foreign Exchange Remittances and there was no other consideration agreed upon or paid for transfer of said flat, there was no understatement of consideration. It is the case of the Petitioners that the Competent Authority, on being satisfied with the explanation that there was no understatement of consideration, the Competent Authority did not acquire the property.

11. It is vehemently submitted by the learned Counsel, Mr.Bhujale for the Petitioners that the Appropriate Authority has not brought any evidence to show understatement of consideration or attempt to evade tax so as to assume jurisdiction for passing a valid order of purchase. It is further case of the Petitioners that the market value of the subject property was not determined.

12. It is further submitted by the learned Counsel for the Petitioners that the comparable transactions in the same building and other comparable transactions proving thereby that there was no understatement of consideration, relied upon by the Petitioners were not considered at all. According to the learned Counsel for the Petitioners, the instances referred to in the notice issued by the Appropriate Authority were not comparable with the subject property, and hence the order of purchase is not valid. The learned Counsel for the Petitioners has contended that the relevant material being the Valuation Report, Note of Deputy Commissioner of Income Tax and material/information regarding transactions relied on by the Appropriate Authority were not furnished, hence clearly violative of the principle of natural justice.

13. Mr.Bhujale, the learned Counsel for the Petitioners also pointed out the "pre-determined mind" of the Respondents from their show cause notice dated 30th December,1992, especially paragraph-3 of its annexure, which reads as under :-

> . We are, therefore, satisfied that this is a fit case for exercising the pre-emptive right of purchase by the Central Government under Section 269UD(1) of Chapter XXC of the Income Tax Act,1961. An order under Section 269UD(1) is, therefore, passed accordingly.

14. Lastly, the learned Counsel for the Petitioners has submitted that the impugned order dated 18th February,1993 is invalid and void-ab-initio, as there was no positive finding that there was an attempt to evade tax, and accordingly, the impugned order is liable to be quashed and set aside.

15. In reply to the contentions of the Petitioners, the learned Counsel Mr.Ashokan for the Respondents contended that at the relevant time it was not the practice to give personal hearing before passing such orders and the Statute did not expressly provide for such a personal hearing before an order is passed. The learned Counsel for the Respondents further submitted that in the impugned order dated 18th February,1993, the Appropriate Authority had concluded that the apparent consideration disclosed in the sale agreement dated 14th September,1986 was very low as compared to the fair market value of the subject property at the relevant time, and the difference between the fair market value and the declared value in the sale agreement was more than 15% as evidenced from the comparable from the sale instances. According to the learned Counsel for the Respondents, an appropriate authority had passed the impugned order in exercise of their powers under Section 269UD(1) of the Income Tax Act. It is the contention of the Respondents that before passing the

order under Section 269UD(1), the Appropriate Authority had given all the opportunities to the parties to show cause the reasons and thereby the principles of natural justice were complied with. The learned Counsel for the Respondents also contended that the market value of the subject property need not be exactly determined for the purpose of arriving at a conclusion that the sale value is understated. It is also contended by the learned Counsel for the Respondents that the present Petition filed by the Petitioners is totally misconceived and it does not disclose any cause of action, hence, the present Petition is liable to be dismissed. However, Mr.Ashokan could not controvert paragraph-3 quoted hereinabove in the show-cause notice. Mr.Ashokan also could not dispute that the relevant material relied upon by the Respondents were not furnished to the Petitioners, though demanded by them.

16. We have perused the judgment of this Court in the case of **Mrs.Nirmal Laxminarayan Grover Vs. Appropriate Authority (Income-Tax Department) and Others 223 ITR 572 (Nagpur Bench)**, wherein this Court had dealt with the issue of purchase of immovable property by Central Government, notice Under Section 269 UD of the Income Tax Act etc. In the aforesaid judgment, this Court had categorically held that the order of Appropriate Authority had passed pursuant to such a defective Show Cause Notice was illegal and

vitiated for not being in consonance with basic principles of natural justice. The Appropriate Authority had not proved by clear and cogent material that the land in question was significantly under valued and hence, the Court held that the order of compulsory purchase was liable to be quashed. The Court observed that it was necessary for the Appropriate Authority to refer to the details in the show cause notice so that the transferor and/or transferee would have real and proper opportunity to meet the case of the Department. The Court further observed that it was necessary to see that issuing a show cause notice is not merely an empty formality. The conclusions of the Authority at the stage of giving a show cause notice are always prima facie or tentative conclusions and if it is not so, its ultimate order would suffer from its bias i.e. pre-determined mind.

17. In the above, we are fully satisfied that the impugned order was passed with a "pre-determined mind" and the order was also clearly violative of principles of natural justice, as the relevant materials relied upon by the Respondents were never furnished to the Petitioners, though demanded.

18. The judgment in the aforesaid case is squarely applicable in the present case. Under these facts and circumstances of the case and in view of the above

referred Judgment of this Court, the impugned order is liable to be quashed and set aside. Accordingly, the impugned order dated 18th February,1993 is quashed and set aside, and the Petition is allowed, and Rule is made absolute in terms of prayer clauses (a) and (b)(i) with costs.

(V.C.DAGA,J.) **(DR.S.RADHAKRISHNAN,J.)**